Zainal bin Hassan @ Jahinal v Public Prosecutor

HIGH COURT (KOTA KINABALU) — CRIMINAL APPEAL NO K42–12 OF 2005
YEW JEN KIE JC
26 AUGUST 2008

Criminal Law — Anti-Corruption Act 1997 — s 42(1) — Statutory presumption under Anti-Corruption Act 1997 — Whether solicitation and acceptance proved — Whether mere denial sufficient to discharge burden of proof — Whether presumption rebutted on balance of probability

Criminal Law — Anti-Corruption Act 1997 — Bribery — Use of trap witness — Whether there was sufficient corroboration

Criminal Procedure — Sentence — Corruption — Whether term of imprisonment and fine excessive

Criminal Procedure — Trial — Adjournment — Whether adjournment should have been granted to enable defence witnesses appear in court — Whether evidence of witnesses would have made difference to outcome of case — Whether miscarriage of justice occasioned in disallowing adjournment

Evidence — Witness — Credibility of — Assessment of credibility based on demeanor — Whether must be consistent with evidence presented

The appellant (a legal officer at the Local Government and Housing Ministry) was charged in the sessions court on two charges of corruption. PW8 had applied to Ranau District Council to rent certain premises. The appellant had asked PW8 for RM60,000 to facilitate her application. PW8 reported the matter to ACA and a trap was planned. Pursuant to the trap, PW8 arranged to meet the appellant at Cafe Oriental Karamunsing on 5 April 1999 at lunch time. The telephone conversation was recorded. Several ACA officers were present, posing as customers. Earlier, RM10,000 cash and a cheque for RM10,000 were given to PW8 by the ACA to be given to the appellant. The appellant arrived and PW8 gave the cheque and cash to him. As the appellant proceeded to leave the café, he was detained by ACA. The appellant did not dispute asking for RM60,000 and accepting RM20,000

from PW8, but claimed that the money was a personal loan. According to the appellant, he and PW8 had a sexual relationship and PW8 wanted him to marry her but he refused, making her angry. The appellant claimed that meanwhile, the documents were finally signed by the Minister and when PW8 came to collect them, he had requested PW8 for a personal loan of RM20,000. On 5 April 1999, the appellant claimed to have received a call from PW8 inviting him for lunch at Oriental Café, Karamunsing Hotel, where she gave him the RM20,000 and where he was later apprehended. The learned trial judge convicted the appellant on both charges and sentenced him to 12 months imprisonment on each charge to run concurrently and further fined the appellant RM300,000 on the first charge, in default of payment, six months imprisonment and RM100,000 on the second charge, in default of payment, three months imprisonment. The appellant appealed claiming that the trial judge erred in fact and in law: (i) in finding that PW8 was not an accomplice or trap witness and in finding her as a credible witness; (ii) by failing to consider the relationship between PW8 and the appellant; (iii) in holding that the onus was on the appellant to prove that the solicitation of RM60,000 and acceptance of RM20,000 was not actuated by corrupt motive; (iv) in refusing adjournment to call two witnesses whose evidence was crucial to the defence; and (v) in imposing an excessive sentence.

Held, dismissing the appeal:

(1) Assessment of credibility based on demeanor is not a touch stone of truth and such assessment must be consistent with the evidence presented during the trial. The learned trial judge's assessment of the credibility of PW8 based on her demeanor was consistent with the evidence (see para 34).

(2) The evidence that PW8 had reported the matter to ACA and subsequently took part in the trap to arrest the appellant was sufficient to make her a trap witness. There was ample evidence to corroborate her evidence (see paras 37 & 38).

(3) As for the demand for RM60,000, the appellant did not say what it was for except to deny that he asked for the money. Mere denial is insufficient to discharge the burden of proof under s 42(1) of the Anti-Corruption Act 1997 ('the Act'). The trial judge having satisfied himself that the prosecution had adduced evidence on the ingredient of solicitation and acceptance had correctly invoked the presumption under s 42 of the Act. The appellant had not rebutted the presumption on the balance of probability (see paras 50 & 69).

(4) It would not have caused injustice to anybody for the court to adjourn the case to see if the two witnesses turned up. The learned trial judge had not exercised his discretion judiciously. However, based on the facts, the calling of the two witnesses would not have made any difference to the trial judge's decision. The denial of an opportunity for the two intended witnesses to testify had not resulted in miscarriage of justice (see paras 76, 78 & 83).

(5) Even if the trial judge had considered the appellant's mitigation, it would not have had much difference to the sentencing in view of the seriousness of the offence. The imprisonment term and the fine imposed were not excessive (see para 88).

[Bahasa Malaysia summary

Perayu (seorang pegawai undang-undang di Kementerian Perumahan dan Kerajaan Tempatan) telah dituduh di mahkamah sesyen atas dua tuduhan rasuah. PW8 telah memohon kepada Majlis Daerah Ranau untuk menyewa beberapa premis. Perayu telah meminta RM60,000 daripada PW8 untuk memudahkan permohonannya. PW8 melaporkan perkara tersebut kepada pihak BPR dan satu perangkap telah dirancang. Mengikut perangkap tersebut, PW8 diaturkan untuk bertemu perayu di Cafe Oriental Karamunsing pada 5 April 1999 waktu makan tengahari. Perbualan telefon telah dirakamkan. Beberapa pegawai BPR yang hadir menyamar sebagai pelanggan-pelanggan. Pada mulanya, RM10,000 tunai dan cek RM10,000 diberikan kepada PW8 oleh pihak BPR untuk diberikan kepada perayu. Perayu tiba dan PW8 memberikan cek dan tunai kepadanya. Semasa perayu beredar meninggalkan café, dia ditahan oleh pihak BPR. Perayu tidak mempertikaikan permintaannya untuk RM60,000 dan menerima RM20,000 daripada PW8, tetapi mendakwa wang tersebut merupakan pinjaman peribadi. Menurut perayu, dia dan PW8 mempunyai hubungan seksual dan PW8 mahu dia mengahwininya tetapi dia enggan, membuatkannya marah. Perayu mendakwa bahawa sewaktu dokumen-dokumen tersebut ditandatangani oleh Menteri dan apabila PW8 datang untuk mengambilnya, dia telah meminta pinjaman peribadi sebanyak RM20,000 daripada PW8. Pada 5 April 1999, perayu mendakwa dia menerima satu panggilan daripada PW8 mengajaknya makan tengahari di Café Oriental, Hotel Karamunsing, di mana dia memberikannya RM20,000 dan di mana dia kemudiannya ditahan. Hakim perbicaraan yang bijaksana menyabitkan perayu atas kedua-dua tuduhan dan menjatuhkan hukuman penjara selama 12 bulan bagi setiap tuduhan dan dijalankan serentak dan selanjutnya mendenda perayu sebanyak RM300,000 bagi tuduhan pertama, sekiranya ingkar membayar, dipenjarakan enam bulan dan RM100,000 atas tuduhan kedua, sekiranya ingkar membayar, dipenjarakan tiga bulan. Perayu yang merayu mendakwa bahawa hakim perbicaraan telah khilaf dalam fakta

dan undang-undang: (i) dalam penemuan bahawa PW8 bukannya rakan sejenayah atau saksi perangkap, dan dalam mendapatinya sebagai saksi yang boleh dipercayai; (ii) dengan gagal untuk mempertimbangkan hubungan di antara PW8 dan perayu; (iii) dalam memutuskan bahawa beban ke atas perayu untuk membuktikan bahawa permintaan RM60,000 dan penerimaan RM20,000 bukannya dengan tujuan rasuah; (iv) dalam menolak penangguhan untuk memanggil dua saksi yang keterangan mereka penting kepada pembelaan; dan (v) dalam mengenakan hukuman yang berlebihan.

Diputuskan menolak rayuan:

(1) Penilaian kredibiliti berdasarkan perilaku bukan merupakan standard kebenaran dan penilaian tersebut mestilah konsisten dengan keterangan yang dikemukakan semasa perbicaraan. Penilaian kredibiliti PW8 oleh hakim perbicaraan yang bijaksana berdasarkan perilakunya adalah konsisten dengan keterangan (lihat perenggan 34).

(2) Keterangan bahawa PW8 telah melaporkan perkara tersebut kepada BPR dan kemudiannya mengambil bahagian dalam perangkap untuk menahan perayu cukup untuk menjadikannya saksi perangkap. Terdapat banyak keterangan yang menyokong keterangannya (lihat perenggan 37 & 38).

(3) Berikutan dengan tuntutan untuk RM60,000 perayu tidak mengatakan wang tersebut untuk apa melainkan menafikan bahawa dia meminta wang tersebut. Penafian semata-mata tidak mencukupi untuk menggugurkan beban pembuktian di bawah s 42(1) Akta Anti-Rasuah 1997 ('Akta'). Hakim perbicaraan yang berpuas hati bahawa pihak pendakwaan telah mengemukakan keterangan mengenai permintaan dan penerimaan tersebut telah menggunakan anggapan di bawah s 42 Akta dengan betul. Perayu gagal mematahkan anggapan tersebut atas imbangan kebarangkalian (lihat perenggan 50 & 69).

(4) Ketidakadilan tidak akan berlaku kepada sesiapa sekiranya mahkamah menangguhkan kes untuk melihat sekiranya kedua-dua saksi tersebut akan muncul. Hakim perbicaraan yang bijaksana tidak menggunakan budi bicaranya secara bijak. Walau bagaimanapun, berdasarkan fakta-fakta, dengan memanggil kedua-dua saksi tidak akan membawa perubahan kepada keputusan hakim perbicaraan. Penafian peluang bagi kedua-dua saksi untuk memberi keterangan tidak menyebabkan salah laksana keadilan (lihat perenggan 76, 78 & 83).

(5) Walaupun sekiranya hakim perbicaraan telah mempertimbangkan mitigasi perayu, ia tidak akan membawa sebarang perubahan kepada hukuman berdasarkan keseriusan kesalahan. Tempoh pemenjaraan dan denda yang dikenakan tidak berlebihan (lihat perenggan 88).]

Notes

For cases on adjournment, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4552–4568.

For cases on Anti-Corruption Act 1997 in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2749–2856.

For cases on bribery, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2829–2843.

For cases on corruption, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3506–3518.

For cases on credibility of witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2689–2705.

Cases referred to

Nachatar Singh Bhag Singh v PP [1986] 2 CLJ 452, HC (refd)

Ng Kok Lian & Anor v PP [1983] 2 MLJ 379, FC (refd)

Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1996] 2 AMR 3989, FC (refd)

PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)

Ramly Md Yasin & Ors v PP [1982] CLJ 200, HC (refd)

Tengku Mahmood v PP [1974] 1 MLJ 110, HC (refd)

Legislation referred to

Anti-Corruption Act 1997 ss 2, 42(2), 45, 45(3)

Sugumar Balakrishnan (Sugumar & Co) for the appellant.
Anthony Kevin Morais (Legal and Litigation Division) for the respondent.

Yew Jen Kie JC:

INTRODUCTION

[1] The appellant was charged in the sessions court as follows:

First charge

'Bahawa kamu pada 18 March 1999, di Kementerian Kerajaan Tempatan Dan Perumahan, Sabah, Kota Kinabalu, di dalam Daerah Kota Kinabalu, di dalam Negeri Sabah, secara rasuah meminta untuk diri sendiri daripada Azurisah bt Radi, satu suapan, iaitu wang sebanyak RM60,000.00 sebagai upah kepada kamu untuk mendapat tandatangan YB Datuk Lajim berhubung dengan surat kuasa di bawah seksyen 37 dan 37(2) Ordinan Kerajaan Tempatan 1961 berkaitan dengan penyewaan bangunan pasar ikan besar Ranau oleh Azurisah bt Radi dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 109(a)(bb) Akta Pencegahan Rasuah 1997 yang boleh dihukum di bawah sekysen 16 Akta yang sama (Undang-Undang Malaysia Akta 575)'.

Second charge: 'Bahawa kamu pada 5 April 1999, jam lebih kurang 1.40 petang di Oriental café, Hotel Karamunsing, Kota Kinabalu, di dalam daerah Kota Kinabalu, di dalam Negeri Sabah, secara rasuah memperoleh untuk diri sendiri daripada Azurisah bt Radi, satu suapan, iaitu wang sebanyak RM20,000.00, iaitu wang tunai sebanyak RM10,000.00 dan cek Bumiputra Malaysia Berhad (BBMB) no 582014 berjumlah RM10,000.00 sebagai upah kepada kamu untuk mendapatkan tandatangan YB Datuk Lajim berhubung dengan surat kuasa di bawah seksyen 37 dan 37(2) Ordinan Kerajaan Tempatan 1961 berkaitan dengan penyewaan bangunan pasar ikan besar Ranau oleh Azurisah bt Radi dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 11(a)(bb) Akta Pencegahan Rasuah 1997 yang boleh dihukum di bawah seksyen 16 Akta yang sama (Undang-Undang Malaysia Akta 575)'.

[2] The appellant claimed trial to both charges and after a full trial, the learned trial judge, on 8 March 2005, convicted him of both charges and sentenced him as follows:

First charge: twelve months imprisonment and RM300,000 fine, in default six months imprisonment; and

Second charge: two months imprisonment and RM100,000 fine, in default three months imprisonment.

THE CASE FOR THE PROSECUTION

[3] It is the testimony of PW8 (Azurisah bt Radi) that in 1998 she applied to Ranau District Council ('RDC') to rent certain premises at Ranau to run a gymnasium and cafeteria. Her application was approved. She duly filled the draft rental agreement and sent it to RDC for their further action. As she did not hear from RDC for a long time after that, she went there to enquire. She was told that RDC had not received any reply from the local Government and Housing Ministry. Since it had taken so long she decided to see the legal officer of the Ministry who is the appellant.

[4] At the meeting, she enquired about the agreement. The appellant told her that it was still under process and that he would help her with the matter. That was her first encounter with the appellant.

[5] Her second encounter was in March 1998. She again asked about the agreement. This time the appellant told her that the processing of the agreement needed some sacrifice (*'pengorbanan'*) in the form of money. She asked what the money was for. The appellant told her it was to get the signature. PW8 asked how much was needed. The appellant said the amount

was RM60,000. When PW8 told the appellant that she did not have that kind of money, the appellant told her she could advance a small amount first and the balance could be paid later. She told the appellant she would try to get the money. According to PW8, only she and the appellant were present when the demand was made.

[6] After the second meeting, the appellant telephoned PW8 a number of times to enquire when she could hand over the money to him. Meanwhile, according to BPR officer PW9 (Muhammad Zamri bin Md Noor), on 22 March 1999 at about 3.30pm, he received a call from someone introducing herself as Azurisah who told him she wanted to lodge a report regarding a demand for money by a government servant. PW9 asked her to go to the office the following day but it was only on 30 March 1999 that she went to the BPR office to lodge a report. The report is marked exh P30.

[7] A trap was then planned by the BPR. It was arranged that PW8 would call the appellant by phone and discuss the demand with him and the conversation was recorded in exh P31. The transcript is marked exh P31(a).

[8] After the telephone conversation, it was arranged that PW8 would meet the appellant at Cafe Oriental Karamunsing on 5 April 1999 at lunch time accompanied by several BPR officers including the director himself posing as customers. Earlier, RM10,000 cash (exh P28) and a cheque for RM10,000 (exh P27) were handed over to PW8 by the BPR to be given to the appellant.

[9] After the appellant arrived, he handed a letter to PW8 and asked her if she brought the money as promised. PW8 answered in the positive but told him that the money was in the form of a RM10,000 cheque and RM10,000 cash. The appellant then asked PW8 to put the cash on the table. As for the cheque, the appellant asked PW8 to cash it first. PW8 replied that she had no time and asked him to cash it himself. The appellant then shoved the cheque into his shirt pocket. Then he proceeded to leave the café together with the RM10,000 cash and was detained by the BPR.

[10] At the conclusion of the case for the prosecution, the learned trial judge held that the evidence of the BPR officers namely, PW9 (Muhammad Zamri bin Md Noor), PW10 (Lee Eak Chuan), PW15 (Yip Pit Wong) and PW16 (Abd Muneim bin Ibrahim) all lend support to PW8's evidence with regard to the demand for RM60,000 and the acceptance of the RM20,000. Accordingly, he made a finding that there was a prima facie case made out against the appellant in respect of each of the charges. He accordingly called upon the appellant to enter his defence.

THE DEFENCE

[11] The appellant denied that he solicited a gratification of RM60,000 and accepted a gratification of RM20,000 from PW8 as inducement to do an official act in connection with PW8's application for rental of a Mini Market in Ranau for a gym and cafeteria. He did not dispute asking for RM60,000 and accepting RM20,000 (RM10,000 in cash and RM10,000 by a cheque) from PW8, but according to him, the money was a personal loan.

[12] The appellant gave evidence that sometime in February 1999, he received a call from PW8 regarding her application for rental of the Ranau Mini Market for a gym and cafeteria. She asked him to look into the case as it had been long outstanding. He told her to provide him with copies of the documents. About two days later, she came to see him at his office but did not bring any document. He told her he could not help without the documents. She said she would bring the documents the next time.

[13] Apart from official matters, he and PW8 also talked about personal matters. He invited PW8 for dinner and PW8 agreed. They had dinner together at the 'XO' Steak House that evening. After dinner he asked PW8 where she would be putting up that night. PW8 told him she would be putting up with her relatives. He suggested, and she agreed, that they stayed together for the night. They stayed at Holiday Park Hotel at Jalan Penampang that night. They had sexual intercourse in room number 304 and checked out the next morning. During their stay at the hotel, PW8 told him she longed to have a stable relationship with someone like him.

[14] PW8 came to the appellant's office again two or three days after the first meeting. This time, PW8 brought with her the documents the appellant had asked her to bring. PW8 told him that he was always on her mind. The night they had dinner together at Sri Capitol Coffee House. After dinner, they checked in at the same hotel and had sex again. She told the appellant she wanted him to marry her, and did not mind being his second wife. However the appellant told her not to rush into marriage.

[15] After the second visit, PW8 called him to ask about her application for rental. The appellant told her he could not help as it was beyond his power. He advised her to write a letter to the Minister of Local Government and Housing. PW8 came to his office two days later with the letter addressed to the Minister. He told PW8 he would try to help her deliver the letter to the Minister.

[16] That night they had dinner together at Sri Melaka and after dinner they checked in at the same hotel. They had sex again that night. On this

occasion, PW8 insisted that they get married because their relationship was already known to her family members. The appellant told her he was not prepared to marry her.

[17] The appellant went on to testify that he saw the Minister and told him about the delay. The Minister then minuted PW8's letter to his permanent secretary in the presence of the appellant. The appellant thereafter vetted the agreement without making any amendment after which he remarked *'Telah disemak'* on the document. After that the appellant prepared the *Surat Kuasa*, (exhs P13 and P14). After the documents were signed by the Minister, the appellant called PW8 to inform her that the documents had been signed. She told him that she would come down to Kota Kinabalu to collect them personally.

[18] PW8 came down to Kota Kinabalu sometime in the second week of March 1999. At this meeting, the appellant requested for a personal loan of RM20,000 from PW8 as he was in financial difficulties. He told PW8 that he was involved with loan sharks and that the sharks were harassing him. PW8 did not reply to his request but instead asked him about their relationship and marriage. The appellant told PW8 that they should just be friends. On hearing that, PW8 became angry and the appellant tried to cool her down. The appellant asked her again about the loan to which PW8 said *'tengok dulu lah'*.

[19] On 5 April 1999, he received a call from PW8 inviting him for lunch. He told her to meet him at the office canteen but PW8 insisted to have lunch at Oriental Café, Karamunsing Hotel. She told the appellant she would bring the money with her. At 12.45pm when the appellant arrived at the café, PW8 was already waiting for him. She told the appellant that she *'ada sudah itu yang kau mau'* (I had what you wanted). He took her to mean the RM20,000 loan that he requested. After that PW8 left. After finishing his lunch and as he was about to leave the cafe, he was confronted and detained by the BPR officers. He confirmed that the RM10,000 cheque was found in his pocket and the RM10,000 cash found in his hand.

[20] The appellant denied that he demanded gratification of RM60,000 and accepted gratification of RM20,000 as an inducement to get the Minister's (DW2's) signature.

GROUNDS OF APPEAL

[21] That learned trial judge erred in fact and in law finding that the PW8 was not an accomplice or trap witness, and in finding her as a credible witness.

[22] That learned trial judge erred in fact and in law by failing to consider the relationship between PW8 and the appellant.

[23] That the learned trial judge misdirected in holding that the onus was on the appellant to prove that the solicitation of RM60,000 and acceptance of RM20,000 was actuated by corrupt motive.

[24] That the learned trial judge had not acted judiciously in refusing adjournment.

COURT'S DECISIONS

Credibility of PW8

[25] Learned counsel for the appellant submitted that the learned trial judge had erred by holding that there was sufficient evidence to corroborate PW8's evidence that the appellant had demanded RM60,000. The transcript of the telephone conversation between the appellant and PW8 on 31 March 1999 and 14 April 1999 respectively show that no such demand for RM60,000 was ever made by the appellant.

[26] Further, argued counsel, PW8 had propensity to lie blatantly against the appellant. This can be seen from the fact that in her report ie P30, she alleged that the appellant demanded RM60,000 on 18 March 1999 in order for the appellant to secure the signature of PW2 on the letter of authorisation. However, in her testimony, she stated that she had received the letter of authorisation (ie P13) to sign contract and letter dated 4 February 1999 ie P14 from the appellant on 2 March 1999 (see p 75 of the appeal record). Given that PW8 had already received P13 and P14 before 18 March 1999, the appellant could not have solicited or demanded RM60,000 from PW8 on 18 March 1999 in order to secure the signature of PW2. Even PW15 (then assistant director of the ACA Kota Kinabalu branch) was under the impression that RM20,000 was a deposit for the appellant to obtain the signature for P13 and P14.

[27] There was also evidence, submitted counsel, from PW5 to show that PW8 had asked PW5 to backdate the agreement so as to fall before the date on which direction of the government came into force regarding the agreement.

[28] It was further submitted that the learned trial judge had erred in finding that PW8 was not an accomplice given that she was an active participant in the crime. As PW8 was an accomplice, argued counsel, as a rule

of prudence her evidence ought to be corroborated as decided in *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379.

[29] It was further submitted that the learned trial judge had not considered whether PW8 was a trap witness, citing *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110 as support.

[30] It was also the contention of the appellant that contrary to the finding of the learned trial judge, the evidence of the ACA officers ie PW9, PW10, PW15 and PW16 could not have corroborated the PW8's evidence that the appellant demanded RM60,000 because the alleged solicitation of RM60,000 was made on 18 March 1999 while PW8 reported to the ACA only on 30 March 1999, which was subsequent to the alleged solicitation.

[31] It was further submitted that the evidence of PW2 (the Minister who signed P13 and P14), would have completely refuted PW8's allegation against the appellant and would have shown that the appellant had no role in getting PW2 to sign P13 and P14 and that his duty was merely to draw out the documents as was his duty as the legal officer at the Ministry of Local Government and Housing.

[32] It was further submitted that if the alleged solicitation of RM60,000 was made on 18 March 1999 as alleged in the report ie P30, the fact that PW8 went to make her report on 30 March 1999 ie 13 days later is fatal as it provided the opportunity for PW8 to fabricate the charge, citing *Nachatar Singh Bhag Singh v Public Prosecutor* [1986] 2 CLJ 452 as support.

[33] The learned trial judge had made a finding of fact that the appellant had solicited RM60,000 from PW8 and his relevant judgment at p 488 of the appeal record is reproduced below:

> I have given particular attention and consideration to the evidence of Azurisah bt Radi (PW8), including her demeanor and manner while giving evidence. Having done that I was fully satisfied that she had been telling the truth on all material matters with respect to which she had testified against the appellant. Her evidence that the appellant demanded RM60,000 can be inferred from her conversation with the appellant as recorded on tape while her evidence that the appellant took the RM20,000 at Café Oriental was witnessed by the BPR officers. In the taped conversation, PW8 did ask the appellant if the sixty thousand could be reduced to which the appellant replied 'Emm … *berapa kira-kira cuba angkanya* …' If the appellant had never demanded the RM60,000, he would, as a senior lawyer, have protested to such reference by PW8. Instead he proceeded to consider PW8's request for a reduction of the amount.

[34] It is to be noted that the learned trial judge had assessed the credibility of PW8 by her demeanor as well as from the evidence. It is fairly established law that assessment of credibility based on demeanor is not a touch stone of truth and that such assessment must be consistent with the evidence presented during the trial. In my judgment, the learned trial judge's assessment of the credibility of PW8 based on her demeanor is consistent with the evidence. The relevant portion in the transcript ie 31(b) found on p 537 of the appeal record is reproduced as follows:

> Suara 2 Jadi tidak boleh kasih kurangkah yang enam puluh ribu itu … yang begitulah …
>
> Suara 1 Emm... berapa kira-kria cuba angkanya.
>
> Suara 2 Emm... Cik Zainal lah yang heh … heh... Kalau boleh kasi kuranglah sebab kalau
>
> Suara 1 Bagus... bagus kau cakap pasal nanti kalau saya anu nanti saya boleh tolong juga saya kasi sampai saja … Berapa yang ada?
>
> Suara 2 Emm … kalau macam dua puluh … Dua puluh boleh kah?
>
> Suara 1 Ah … ok boleh.

During the play over of the recording in court, PW8 identified *suara 1* to be her voice and *suara 2*, the appellant's voice. Judging from the flow of conversation between PW8 and the appellant, it can be logically inferred that the sum of RM60,000 mentioned in the telephone conversation had featured in the conversation between the two parties previously.

In my opinion, if RM60,000 was unilaterally uttered by PW8 for the first time out of the blue, the appellant would be at a loss and his natural response would be to ask PW8 and want to know what this RM60,000 was about. Far from being surprised, the appellant responded by saying that he would consider the reduction. For this reason, I have no reason to disturb the inference that the learned trial judge had drawn from the telephone conversation and believed PW8 that the appellant had demanded RM60,000 from her.

[35] The learned trial judge had considered whether PW8 was an accomplice and came to the following conclusion:

> is PW8 an accomplice or a person who is no better than an accomplice? Having regard to the situation that she was in, I do not think she can be categorised as an accomplice. It was the appellant who took advantage of her predicament. Event if she was an accomplice, there is in my view sufficient evidence to corroborate her testimony that the appellant demanded RM60,000 and obtained the RM10,000.

The contents of the tape recorded conversation between the appellant and PW8 clearly show that the demand was indeed made. A

[36] I fully agree with the learned trial judge's finding that PW8 is not an accomplice. The evidence shows that after her successful application for renting certain premises at Ranau to run a gymnasium and cafeteria, she forwarded the duly completed draft lease agreement to Ranau District Council for their further action. She heard nothing from the council for a long time after which led her to make inquiry at the council. At the council, she met the appellant who told her that it was still under process and that he would help her with the matter. At their second meeting in March 1998, she asked the appellant about the agreement and the appellant told her that it would require some *'Pengorbanan'*, that is, money to get the signature for the agreement. The appellant then asked for RM60,000. The foregoing facts show that the appellant had taken advantage of PW8's anxiety and eagerness to get the lease agreement signed and executed by demanding money from her. PW8 was put in a spot, for she could be either accede to the demand or reported the matter to the Anti-Corruption Act. She opted the latter. B C D

[37] Although the learned trial judge did not make a finding whether PW8 was a trap witness, the evidence that she had reported the matter to the ACA and subsequently took part in the trap to arrest the appellant is sufficient to make her a trap witness. E

[38] In this connection, there is ample evidence to corroborate her evidence. The first is the recorded conversation referred to in the above, and, the discovery of the marked notes on the appellant (see *Ramly Md Yasin & Ors v Public Prosecutor* [1982] CLJ 200. F

[39] I find the submission that PW8 had asked PW5 to change the date to be unsubstantiated. A careful perusal of p 69 of the appeal record shows that initially PW5 agreed when it was put to her: '*Adakah benar bahawa Azurisah telah berjumpa dengan kamu dan cadangkan backdatekan perjanjian itu untuk mengelak P10*?' she replied that *'Saya tidak bersetuju dengan cadangan untuk backdate, saya tidak bersetuju sebab cadangan itu adalah cadangan yang tidak betul'*. Given the vehement denial by PW5, the submission on this respect is accordingly unsubstantiated. G H

[40] The appellant also made an issue that the appellant could not have demanded RM60,000 from PW8 on 18 March 1999 as a reward for obtaining the signature of PW2 on exh P13 and P14 given that there is undisputed evidence that P13 and P14 had already been signed by PW2 on 20 February 1999 and they were delivered to PW8 in the second week of March 1999. I

[41] Suffice it to say that the fact that PW2 had signed P13 and P14 prior to 18 March 1999 and that PW8 might have known of PW2's signature of approval before passing the money to the appellant is irrelevant. This is because the transcript P31(b) amply shows that the appellant had demanded RM60,000 from PW8 and subsequently received gratification from her.

[42] The appellant also submitted that the learned trial judge had failed to consider at all the evidence of PW2 that the appellant had in no way been involved in securing his signature of P13 and P14 nor was the appellant in any way involved in the transaction beginning from P11 until PW2 signed P13 and P14.

[43] The offer to help only the conduit for the commission of the offence. It is immaterial whether the appellant was actually involved in securing the signature of PW2 on P13 and P14 or for that matter, the process of approving the application. What is important is what the appellant had represented to PW8 and that she believed him and that he could help to secure the signature.

[44] As for PW8 making the report only 13 days later, suffice it to say that the respondent had adduced the evidence in tape recording which together with the evidence of ACA's officers corroborated PW8's evidence on solicitation and that subsequently RM20,000 was given to, and accepted by the appellant.

[45] Based on the reasons aforesaid, there's clearly no substance in the complaint raised herein pertaining to the credibility of PW8.

Whether learned trial judge had considered the relationship between PW8 and the appellant

[46] Learned counsel submitted that the learned trial judge had erred in law and in fact when he failed to consider the relevance of the appellant's evidence pertaining to the intimate relationship between him and PW8 and the refusal of the appellant to marry her had led her to make the police report ie P30. He further submitted that the learned trial judge had not considered the probability that PW8 had a motive for fabricating a charge against the appellant by reason of the appellant's refusal to marry her after having had intimate relations with her.

[47] Basically, the complaint here is that the learned trial judge erred in fact by disbelieving that the sum of RM20,000 was a personal loan.

[48] Pages 468–470 of the appeal record detailed the learned trial judge's narration of the appellant's version. Thereafter he said as follows: A

> It is clear that what the appellant was trying to establish in his defence is that the RM20,000 he obtained from PW8 was not corrupt money but a personal loan to pacify the loan sharks and that PW8 fixed him up because he refused to marry her. Is it probable that the RM20,000 was a personal loan? I have given serious thought to this. In the face of the evidence I am left in no doubt that this is nothing but an attempt to mislead the court, tailored to counter PW8's evidence that the RM20,000 was for the purpose of obtaining Datuk Lajim's signature on the documents. In this connection, it is pertinent to note that in the tape conversations (exhs P31 and P32) between PW8 and the appellant, the appellant did not say a word about loan. I am satisfied that the appellant has totally failed to disprove the presumption under s 42(1) of the PCA. I reject his assertion that the RM20,000 was a personal loan. To my mind there is no truth in it. B C

[49] I fully agree with the learned trial judge. Indeed, if the sum of RM20,000 was a personal loan as claimed by the appellant, it is strange that the appellant did not mention a word about the loan in the recorded telephone conversation. A perusal of the transcript of the recorded conversation in P31(1) referred to in the above amply shows that the issue of the sum of RM20,000 was in fact raised by PW8 after she asked the appellant whether RM60,000 could be reduced. D E

[50] As regards the first charge, the learned trial judge said: 'As for the demand for RM60,000, he did not say what it was for except to deny that he did ask for the money. A bare denial cannot be sufficient to discharge the burden of proving on the balance of probabilities that it was not solicited corruptly. At the end of the whole case, I was not only satisfied that the appellant failed to rebut the statutory presumption under 42(1) of the PCA but I also satisfied that he had failed to raise any reasonable doubt on the prosecution's case. I was satisfied that the prosecution has proven the two charges beyond any reasonable doubt and accordingly convicted the appellant of the two charges'. F G

[51] I agree with the learned trial judge that mere denial is insufficient to discharge the burden of proof under s 42(1) of the Prevention of Corruption Act 1997 (to add more). H

[52] Learned counsel also submitted that in the appellant's statement given to the ACA subsequent to his arrest pursuant to s 45(3) of the Anti-Corruption Act, he had stated that it was a personal loan. He said the same thing in court. The learned trial judge had no reason not to consider I

what the appellant said in his statement as being believable in the light of the statutory provision in s 45(3). The same section can aid not only the prosecution but also the defence. If in his statement he had said something else or he did not mention 'personal loan', the prosecution would use s 45(3) to say that the appellant cannot be believed, so why can the same rule not apply for the benefit of the appellant? It was submitted that the learned trial judge never considered this point which the appellant had submitted before him.

[53] I do not agree. The learned trial judge had clearly given his careful consideration to the submission on the above point in his judgment on p 470 of the appeal record, where he said as follows:

> It is true that this line of defence was raised by the appellant at the earlier possible opportunity, ie in his statement (exh D2) to the BPR soon after his arrest. Learned counsel for the appellant submitted, on the authority of s 45(3) of the PCA that there is a reverse statutory presumption in that since the appellant had at the time of recording D2 specifically mentioned that the RM20,000 he asked for from PW8 was a loan and he did not depart from this assertion at the trial, his evidence on this point is therefore more likely to be believed. How should the court deal with this type of evidence? In *Mohd Mocta Shariff v Public Prosecutor* [1983] 2 CLJ 216 the learned judge made the following observation:
>
> > … It is not enough for an appellant person merely to have repeated the same story which he told in his police report, and in his cautioned statement on oath at the trial in order to make a successful defence. Mere repetition however exact cannot ensure an acquittal because that will tantamount to requiring a court to acquit merely on the basis of the face value of the evidence given. An appellant person has a greater onus than that cast upon him. He must go further and throw a reasonable doubt on the prosecution's evidence or else at least give a version which is equally consistent with his innocence and which version has to have the required degree of probability.
>
> The above proposition relates of course to a situation where no evidential burden is imposed on an appellant person. Where such burden is imposed, such as the burden imposed by s 42(1) of the PCA, the onus on an appellant person is heavier and the principle that the appellant has no duty to prove or disprove anything has no application. In the present case clearly the appellant has a duty to prove that the RM60,000 he asked for and the RM20,000 he obtained from PW7 (sic) were not actuated by corrupt motive. The quantum of proof required is of course on the balance of probabilities. As I have mentioned earlier in this judgment he has failed to do so.

[54] I have no reason to disagree with the learned trial judge on this. Section 45(3) of the Anti-Corruption Act 1997 states:

> (3) Where any person is arrested or is informed that he may be

prosecuted for any offence under this Act, he shall be served with a notice in writing, which shall be explained to him, to the following effects:

> you have been arrested/informed that you may be prosecuted for... Do you wish to say anything? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back when you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done.

[55] The provision under s 45(3) of the Anti-Corruption Act 1997 serves to inform the person arrested in connection with a corruption offence to state the defence he intends to rely on in the trial and the consequence if he fails to do so.

[56] If I agree with the submission of learned counsel, it would mean that where an appellant gives the same defence as he had stated in the s 45 statement, he is entitled to be believed and the court must accept it at face value.

[57] It must be borne in mind that it is not unusual for the party to make self-serving and exculpatory statements. The Federal Court in *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1996] 2 AMR 3989, held that the use of such statement as a basis for acquittal and discharge is a wrong approach.

[58] In my opinion, the probative value of s 45 statement will depend on a host of other factors such as the assessment of his credibility and the degree of probability of his story in the light of the other evidence.

[59] The crux of the defence is that RM20,000 was a personal loan. The learned trial judge had found it to be highly improbable because there was no mention of a loan in the recorded telephone conversation in exh P31(b). I may go further to say that after considering the telephone conversation transcribed in P31(b), it must be noted that the sum of RM20,000 was mentioned by PW8 after the appellant agreed to consider to reduce the sum of RM60,000. Indeed, PW8 explained that when she said, *'kalau macam dua puluh bolehkah'*, she was asking for the amount of RM60,000 demanded by the appellant to be reduced to RM20,000.

[60] This explanation of PW8 is consistent with the tenor of the whole conversation between PW8 and the appellant.

[61] Even assuming that RM20,000 was a loan, which the learned trial judge had correctly found not to be the case, it is still gratification pursuant to s 2 of the Anti-Corruption Act 1997. Section 2 of the Anti-Corruption Act 1997 defines 'gratification' thus:

(a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, or any other similar advantage;

[62] In P31(b), the utterance by the appellant (suara 2) uttered *'Bagus … bagus kau cakap pasal nanti kalau saya anu nanti saya boleh tolong juga saya kasi sampai saja .... Beberapa yang ada?'* amply demonstrates that the purpose of the 'loan' was related to the process of the lease agreement.

BURDEN OF PROOF

[63] Learned counsel further submitted that the learned trial judge was misdirected in law when he held that the onus was on the appellant to prove that his allegedly demanded for RM60,000 and RM20,000 and obtaining the same from PW8 was not actuated by corrupt motive because all that the appellant was required to do was to rebut the presumption since the burden rests till the end of the case on the prosecution to prove beyond reasonable doubt.

[64] Learned counsel also submitted that the learned trial judge erred in law and in fact when he held that the appellant had failed to rebut the statutory presumption under s 42(1) of the Anti-Corruption Act 1997 and had failed to raise any reasonable doubt on the prosecution's case and when he held that the prosecution had proved the two charges beyond reasonable doubt.

[65] At p 171 of the record of appeal the learned trial judge said that 'the appellant had a duty to prove that the RM60,000 he asked for and RM20,000 he obtained from PW7 (sic) were not actuated by corrupt motive'.

[66] Reading this together with his judgment on p 467 of the appeal record, where he said after referring to s 42(1) of the Prevention of Corruption Act 1997, as follows:

To succeed in his defence the appellant must prove, on the balance of probabilities that the RM60,000 he solicited and the RM20,000 that he obtained from PW8 were not corrupt money. If he fails to discharge this burden he must be convicted of the offences charged: *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89. The burden is lighter than the burden of the prosecution to prove beyond reasonable doubt but it is heavier than the burden of merely casting a reasonable doubt in the prosecution's case: *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169.

[67] Section 42(1) of the Anti-Corruption Act provides:

(1) where in any proceedings against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or agreed to be obtained, solicited, given or agreed to be given, promised or offered, by or to the accused, the gratification shall be presumed to be corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for on account of the matters set out in the particulars of the offence, unless the contrary is proved.

[68] Pursuant to s 42(2) of the Anti Corruption Act, the solicitation and acceptance of any gratification is presumed to be corruptly solicited and accepted unless the contrary is proved. Accordingly, once the element of solicitation and acceptance has been proven, the evidential burden to prove that the gratification solicited and accepted is not corrupt shifted to the appellant and based on the clear authority in *Yuvaraj*, the appellant has to discharge that burden on the balance of probability.

[69] In the present case, the learned trial judge having satisfied himself that the prosecution had adduced evidence on the ingredient of solicitation and acceptance had correctly invoked s 42 of the Act. After hearing the defence, made a finding that the appellant had not rebutted the presumption on the balance of probability. He accordingly found that the prosecution has proved its case beyond reasonable doubt and convict the appellant as charged.

[70] Based on the above reasons, there is no substance in this complaint.

Whether learned trial judge had not acted judiciously in refusing adjournment

[71] The complaint here is that the learned trial judge had refused to grant an adjournment to enable the appellant to call two witnesses whose evidence was crucial to the defence. The first witness was Jolison Ginning, who, would

corroborate the appellant's case that the appellant and PW8 had a sexual relationship and that both of them had checked into Holiday Park Hotel.

[72] The other witness was Ainah bt Harih Jim who would corroborate the appellant's case that the appellant had asked for a loan of RM20,000 from PW8. It was put to PW8 during her cross-examination that PW8 had told Ainah that the appellant had asked to borrow RM20,000 from her and she wondered whether she should lend. Ainah advised against lending saying that it would be difficult to get it back.

[73] Learned counsel submitted that the learned trial judge has not exercised his discretion judiciously when he refused to grant an adjournment on 17 February 2005 considering that the appellant concluded giving his evidence at 12.20pm and requested for the hearing to be adjourned to the same afternoon at 2.30pm to enable him to call two of his witnesses. The length of adjournment sought was only two hours and therefore would not have caused any prejudice to the court or anybody.

[74] The defence did not subpoena the two witnesses because they were prepared to testify in court willingly. It was submitted that the court should have adjourned the hearing to 2.30pm at least to see whether the two witnesses would turn up. This failure to exercise his discretion judiciously had denied the appellant of his right to put up his case resulting in miscarriage of justice.

[75] It was further submitted that the crux of the defence was that there was a sexual relationship between the appellant and PW8 and that RM20,000 was a loan. It is therefore crucial that the two witnesses should have been given the opportunity to testify. One never knew whether the learned trial judge might have come to a different conclusion if he had heard the evidence of the two witnesses. It was submitted that it was injustice to deny the appellant the opportunity of calling his witnesses.

[76] At p 170 of the appeal record, it was shown that on 17 February 2005, after the appellant concluded giving his evidence, the following event transpired:

> D/C: I have two more witnesses to call. Both are not here at the moment. I seek for a short adjournment until 2.30 p.m. Both were not subpoenaed for today's hearing. Other that (sic) these two I have no other witnesses to call.

DPP: Kalau saksi tidak disapina, kita tidak boleh harap dia akan hadir di Mahkamah.

Court: Saya tidak akan membenarkan apa-apa penangguhan, walaupun ke – 2.30 p.m.

D/C: In the light of the Court's refusal to call my last two crucial witnesses, I have no choice but to register my protest against the refusal to allow the defence to put forth it's case adequately. Without these two witnesses I am in no position to close my case.

DPP: Serah pada budi bicara Mahkamah.

Court: Pihak-pihak kemukakan hujah.

[77] Further, p 157 of the appeal record shows that on 28 January 2001, when the learned trial judge adjourned the hearing to 17 February 2005 at 9am he did not say that the hearing was only for the morning sessions. Noting that the time of the application for adjournment was around 12.20pm and near lunch time, combined with the fact that the hearing was for the whole day of 17 February 2005, it is my opinion that the learned trial judge ought to have granted the application to adjourn the hearing to 2.30pm. It would not have caused injustice to anybody for the court to adjourn the case for lunch and resume again at 2.30pm to see if the two witnesses, who had not been subpoenaed, would turn up. Accordingly, I agree that the learned trial judge had not exercised his discretion judiciously.

[78] The question now is whether such refusal has resulted in a miscarriage of justice and whether the learned trial judge would have come to a different decision after he had heard Jolison Ginning and Ainah bt Harih Jim.

[79] Having perused the judgment of the learned trial judge and the evidence adduced during the trial, I am of the view that the calling of the two witnesses would not have made any difference to the decision of the learned trial judge.

[80] It is evident from the judgment of the learned trial judge based his judgment on the ground that there was solicitation for RM60,000 on the transcript (P31(b)) of the tape recording. It is unlikely that any evidence from Jolison Ginning and Ainah bt Harih Jim would change the cold print of the conversation between PW8 and the appellant recorded in P31(B).

[81] From the way PW8 asked so hesitantly whether the sum of RM60,000 could be reduced to RM20,000, she hardly sounded like a vindictive women spurned by a lover.

[82] Further, from the answer given by the appellant to PW8's request for a reduction of RM60,000 it does not appear as though he was harassed by loan sharks and needed a loan from PW8 to get him out of his predicament. His answer that 'Bagus …' amply shows that the sum of RM60,000 which was subsequently reduced to RM20,000 was not a loan, but for the appellant to help PW8 in doing something.

[83] Even if it were a loan, which I do not think to be the case, it is still gratification within the definition under s 2 of the Anti-Corruption Act 1997.

[84] Based on the reasons given above, it is my judgment that the denial by the learned trial judge of an opportunity for the two intended witnesses to testify has not resulted in miscarriage of justice and accordingly this ground of appeal has no merit.

APPEAL AGAINST SENTENCE

[85] Learned trial judge sentenced the appellant to 12 months imprisonment on each charge to run concurrently.

[86] Learned trial judge further fined the appellant RM300,000 on the first charge, in default of payment, six months imprisonment.

[87] Learned trial judge also fined the appellant RM100,000 on the second charge, in default of payment, three months imprisonment.

[88] Learned counsel for the appellant submitted that the sentence imposed was manifestly excessive and did not take into account the mitigating factor that was put further to the learned trial judge. Further, the fine of RM300,000 and RM100,000 on the first and second charges respectively are incorrect in law, without elaboration.

[89] In his grounds of sentencing, the learned trial judge had considered the gravity of the offence and the element of public interest. Although it does not go on record that he had taken into account the mitigation of the appellant. In my opinion, even if the learned trial judge had considered that, it would not have much difference to the sentencing in view of the seriousness

nature of the offence. I do not see the need to disturb the imprisonment term and the fine imposed because they are not in my view excessive.

Appeal dismissed.

Reported by Kanesh Sundrum